

**Leisure Chateau Care Center and Communication Workers of America, AFL-CIO.** Case 4-CA-28807-2

March 13, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND BRAME

Pursuant to a charge filed on December 10, 1999, the General Counsel of the National Labor Relations Board issued a complaint on January 4, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4-RC-19722. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On January 28, 2000, the General Counsel filed a Motion for Summary Judgment. On February 3, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Our dissenting colleague asserts that the Board incorrectly denied review in the underlying representation case. Because he believes that the Board is obligated to "give each record a full and careful" review in cases raising issues regarding the supervisory status of charge nurses, he would not grant the Motion for Summary Judgment. In denying review in the representation case, however, we determined that the Respondent had identified no substantial issue either of fact or of law regarding the Regional Director's determination, after his review of the record, that the RN and LPN charge nurses in this case are not supervisors. To reverse our determination at this

stage would be contrary to our long-settled policy not to allow the parties to relitigate representation case issues in "test of certification" unfair labor practice proceedings, absent newly discovered or previously unavailable evidence or special circumstances. *Pittsburgh Plate Glass*, supra.

Further, our dissenting colleague selectively cites the decision of the Fourth and Sixth Circuits. He fails to acknowledge that the Board's position on the supervisory status of charge nurses has been upheld by the First, Eighth, Ninth, and District of Columbia Circuits. *NLRB v. Hilliard Development Corp.*, 187 F.3d 133 (1st Cir. 1999); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB 598 (1997); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 45 (1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (1996) (not reported in Board volumes).

Moreover, in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), also cited by our dissenting colleague, the Third Circuit Court of Appeals specifically stated that it was "not creating a per se rule that LPNs are supervisors." 149 F.3d at 249. Further, that case is factually distinguishable as the nurses there had the disciplinary authority to send aides home for flagrant misconduct, including resident abuse, and to resolve minor problems or "gripes" over matters covered by the aides' collective-bargaining agreement. We believe that the Regional Director's analysis of the facts presented in this case correctly finds that the evidence alleged to establish disciplinary authority is vague, remote in time, or does not indicate the use of independent judgment. Similarly, the assertions that the LPNs are authorized to adjust grievances were not supported by specific examples.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation, has been engaged in the operation of a nursing home at 962 River Avenue, Lakewood, New Jersey. During the calendar year preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of \$100,000 and purchased and received goods valued in excess \$5000 directly from points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. We also find that the Union has been a labor

organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Certification

Following the election held September 3, 1999, the Union was certified on September 17, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time licensed practical nurses employed by Respondent at its Lakewood, New Jersey nursing home, excluding all other employees, Registered Nurses, Unit Coordinators, Nursing Administrator, Assistant Nursing Administrator, Certified Nursing Assistants, orderlies, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. Refusal to Bargain

Since November 1, 1999, the Union, by letter, has requested the Respondent to bargain and, since November 1, 1999, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing on and after November 1, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, Leisure Chateau Care Center, Lakewood, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Communication Workers of America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time licensed practical nurses employed by Respondent at its Lakewood, New Jersey nursing home, excluding all other employees, Registered Nurses, Unit Coordinators, Nursing Administrator, Assistant Nursing Administrator, Certified Nursing Assistants, orderlies, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Lakewood, New Jersey, copies of the attached notice marked "Appendix."<sup>1</sup> Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting.

I dissented from my colleagues' denial of the Employer's request for review in the underlying representation case and I do so here. As I indicated then, the close scrutiny given by the courts of appeals to the Board's decisions on supervisory issues warrants a full and care-

<sup>1</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ful examination of the record in this case through a grant of review. See, e.g., *Beverly Enterprises v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (en banc); *Fair Oaks Health Care Center v. NLRB*, 148 F.3d 638 (6th Cir. 1998); *Grancare v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998). In particular, the Employer's apparently uncontradicted contention that the LPNs, among other potential indicia of supervisory authority, have the authority to suspend or send home employees who have committed serious infractions such as patient abuse or reporting for work while intoxicated warrants careful consideration. See *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998) (recognizing that authority to send employees home for flagrant violations such as intoxication is "clearly disciplinary in nature").

Accordingly, I dissent from my colleagues' decision to grant summary judgment.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Communication Workers of America, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time licensed practical nurses employed by us at our Lakewood, New Jersey nursing home, excluding all other employees, Registered Nurses, Unit Coordinators, Nursing Administrator, Assistant Nursing Administrator, Certified Nursing Assistants, orderlies, guards and supervisors as defined in the Act.

LEISURE CHATEAU CARE CENTER